Court, U.S.
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JUL 27 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-432

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LOCAL NO. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, AND PACKERS; BART GRIFFITHS, SECRETARY-TREASURER, LOCAL NO. 82; GEORGE HARRIS, PRESIDENT, LOCAL 82; PHILLIP PIEMONTESE, CHAIRMAN OF THE ELECTION COMMITTEE OF LOCAL NO. 82; AND JOHN DOE, JAMES DOE and JEROME DOE, MEMBERS OF THE ELECTION COMMITTEE OF LOCAL NO. 82,

Petitioners,

RAYMOND DONOVAN, SECRETARY OF LABOR,

Intervenor,

v.

JEROME CROWLEY, ANTHONY COYNE, JOSEPH FAHEY, ROBERT LUNNIN, JAMES HAYES, GERALD OWENS, JOHN LYNCH, JOSEPH TRASK, JOSEPH MONTAGNA, and DENNIS BATES,

Respondents,

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Should this Court entertain questions presented on a writ of certiorari which have been removed from the litigation by stipulations the petitioning party voluntarily entered into in the district court?

2. Has the instant writ of certiorari been rendered moot on account of the fact that the passage of time and intervening occurrence of events have made it impossible for this Court to afford petitioners any meaningful relief hereon?

3. When a district court has determined that union officials actions have, in the course of an election which union officials subsequently declared to be null and void, abridged members' fundamental democratic rights in violation Section 101 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. s. 411, does Section 102, 29 U.S.C. 412 permit the court to set minimal terms and conditions under which a subsequent election, which the union bound itself to conduct, will be conducted, supervise the conduct of said election and enjoin the reoccurrence of like violations of the Act during the course of said election.?

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

STATEMENT OF FACTS

The Respondents adopt the statement of facts contained in the findings of the District Court (Pet. App. A at 17-21).

PROCEEDINGS BELOW

The Respondents filed a complaint in the U.S. District Court for the District of Massachusetts on December 1, 1980. They alleged that their rights under Title I of the Labor Management Reporting and Disclosure Act, 29 U.S.C. 401 et seq (hereinafter referred to as "the Act" or "the LMRDA") had been violated by the Petitioners before, during and after a November 9, 1980 union meeting to nominate

officers for a scheduled mail ballot election. The Respondents' Complaint asserted four Title I claims pertinent to the issues discussed hereinafter. In summary these claims were that the Petitioner incumbent union officers intentionally interfered with the rights of the Respondents, many of whom had been outspoken critics of the incumbent officers, guaranteed under Sections 101(a)(1), (2) & (5) of the Act, to attend the nomination meeting and express their views on candidates therein:

(1) by discriminatory application of a previously unenforced entrance requirement;

(2) by misrepresenting to them who was eligible to run for office;

(3) by refusing to accept their nomination of a candidate to oppose the principal executive officer of the union; and

(4) by imposing unfair discipline on one of

them in reprisal for his protesting the aforementioned violations of Respondents' rights.

Before all the ballots in the mail election were scheduled to be collected and tallied, the District Court issued a temporary restraining order impounding them.1/ In late December, 1980, the Court conducted five days of evidentary hearings on the Respondents' motion for preliminary injunction, which sought to have the ballots declared void and a lawful nomination meeting held.

After the aforementioned hearings were concluded, but before any action had been taken by the Court, the Petitioners, on January 9, 1981, notified the Court that they had changed their prior position and bound themselves to a voluntary, binding

1. The temporary restraining order of the District Court is not in issue on the instant writ.

written stipulation, which in part stated:

> Teamsters Local 82 is prepared to and will conduct a second nomination and mail ballot election for the election of officers under the following terms, provided the Court permits a change in the status quo preserved by its Order of December 12, 1980...
> Jt. App. at 55 (emphasis added)

Upon close questioning by the Court on two separate occasions the Petitioners emphatically denied they were merely making an offer of settlement, but instead acknowledged that they were making a binding stipulation to annul the ballots impounded by the Court and hold a valid nomination and balloting process 2/ (Jt. App. at 99 & 108-110).

---

2. The record repeatedly affirms that Petitioners' stipulation was not in any sense an offer of settlement that had to be accepted by Respondents to become binding. It was a binding stipulation and became part of a binding court order, which has been effectuated (Jt. App. at 99, 108-110). The transcripts of two exchanges between the Court and counsel for Petitioners make this absolutely clear:

MS. NOONAN: Yes, your Honor. In essence I asked for the conference to let you know that by vote of the executive board last night I was authorized to advise the Court that Local 82 is prepared to run another nomination meeting, another election by mail ballot, send notices out to all members specifying the eligibility requirements for running for office as I set out in the letter...

.....

THE COURT: ...And I am now understanding you to say not that you are proposing, if you will, a settlement which must be accepted as a package or not; rather you are proposing to make some stipulations of record which the Court would now take into account in determining whether it went far enough toward meeting the claims that are asserted that the Court should not intrude with preliminary relief...

MS. NOONAN: Yes, your Honor...

(Jt. App. at 97-99) (emphasis added)

and

MR. WITLEN: At this stage of the proceedings the Defendant's stipulation that was ordered--that was offered in early January have effectively been withdrawn by the failure of the parties to agree that the stipulation is an adequate substitute per order of the Court.

THE COURT: Now, that I do not understand because I questioned you explicitly about whether it was an offer of settlement or a binding stipulation. And I got the answer, "It is a binding stipulation."

MR. WITLEN: As offered, not as modified.

THE COURT: Well, all right, I understand that. One of the things that is very clear from that is that you have stipulated that a new election would be conducted; that the election that was conducted to the nomination meeting of November 9, would not be longer asserted to be valid. Now, are you undertaking to withdraw that stipulation?...

.....

THE COURT: Now, I want to be very clear about this. You presented to me an argument that you were making not an offer of settlement but a binding stipulation, and on the basis of that you argued that I lacked jurisdiction.

MR. WITLEN: That's correct, your Honor...

THE COURT: I think that you are trying to withdraw from a binding stipulation you made when I made it very explicit[, "]I want to know whether it is a binding stipulation or an offer of settlement?["] If it were only an offer of settlement, then the position that you are now taking would be appropriate. I got the other answer. It is not an offer of settlement, it is a binding stipulation, and on the basis of it, an assertion of lack of jurisdiction in this Court to order anything else. I have overruled that assertion. That does not give you an opportunity to withdraw a binding stipulation. If you wish to withdraw that binding stipulation, you are going to have seek my permission and show good cause for doing so, otherwise I will not permit it to be withdrawn...

.....

Based on their stipulations the Petitioners moved that the District Court dismiss the Respondents' complaint on the basis that the stipulations deprived the Court of its jurisdiction. The Court denied this motion (Jt. App. at 105-6).

One of the terms 3/ to which

> MR. WITLEN: It's the Defendant's position that a stipulation was offered. And there were certain terms set forth in that stipulation. The terms for conducting the election have now been modified by the Court. While Defendants will stand by the initial stipulation, the Defendants are not willing to stipulate to the additional terms that are being required--
> THE COURT: That I understand and I'm not suggesting that you are foreclosed in any way from contesting the Court's ordering of somewhat different terms from those you proposed in the stipulation.
> MR. WITLEN: I think that we are now all in agreement, your Honor.
> (Jt. App. at 108-110) (emphasis added)

3. The Petitioners' stipulation contained a number of terms regarding the manner in which the election would be conducted. At the request of the Court further stipulations were filed containing additional terms for incorporation into the Court's order regarding the election to be conducted (Jt. App. 55-60, 76-78 & 104-105).

Petitioners stipulated was that the nomination meeting and balloting they would conduct would be supervised by disinterested members of the next higher entity in the international structure of the Petitioner Union, Joint Council 10 (Jt. App. at 55-60 and 76-78). However, at the next hearing Petitioners advised the District Court that neither Joint Council 10 nor the President of the International Union was willing to undertake supervision of the election to be scheduled, if they would have to be accountable to the Court in doing so (Jt. App. at 106-8), and that

During the course of these hearings Petitioners also advised the Court that Joint Council 10 had reviewed and vacated the discipline imposed on the Respondent Lunnin, and deferred taking any action on Respondents' charges concerning the conduct of the election until Respondents' claims before the District Court were resolved (Pet. App. A at 6).

for this reason Petitioners had no objection 4/ to the Court's appointment of any third party not affiliated with Respondents to do the same (Jt. App. at 110-12).

On July 13, 1981, after leave had been granted by the Court for the Petitioners to declare the ballots they had previously mailed to members null and void, and long before the electoral processes proposed by the union were commenced, the District Court issued a memorandum decision (Pet. App. A at 1-40) and a preliminary injunction (Pet. App. B at 86-93). In its memorandum decision the Court found the Respondents to have shown a substantial

4. The District Court was prepared to allow Joint Council 10 or some other entity affiliated with the union supervise the election (Jt. App. at 104-105), but said entities refused to do so. Only after said refusal did the Court appoint a third party and then only after Mr. Witlen, counsel for Petitioners, represented to the Court:

> "The local union is willing to bring in a third party." and "We are not going to have any objection to any person that is designated to run the election." (Jt. App. at 104 and 112).

likelihood of prevailing on the merits of their claims that the Petitioners had violated their rights under Title I. The preliminary injunction provided for an election to be conducted within 80 days and supervised by third parties to whom the Petitioners had specifically noted they did not object. The order also enjoined the two principal officers of the union, Petitioners Griffiths and Harris, from violating specified rights of any member of Local 82 (Pet. App. B at 92). The Petitioners objected at that time only to the Court's findings of fact and enjoining future violations of Respondents' Title I rights,5/ and to the fact that the Court

5. Both the record and Petitioners' arguments to this Court reveal that they do not now and never truly have asserted any bases for challenging the jurisdiction of the District Court to have entertained Respondents' Title I claims and granted some form of relief on them: in particular the order enjoining future violations of Respondents' Title I rights. At most Petitioners object now and then objected only to some of the form of relief requested and afforded on Respondents' Complaint.

ordered the election to be conducted pursuant to and subject to a Court order. It is solely from the last part of this order that Petitioners seek relief from this Court.

The Petitioners filed an appeal in the Court of Appeals for the First Circuit and sought a stay of the election, which was denied. The election was conducted thereafter in accordance with the Court's order without incident or protest by any member. The officers elected at that time are presently serving out the end of their terms of office, which expire in January of 1984.

On May 21, 1982 the First Circuit Court of Appeals affirmed the decision of the District Court. In doing so the Court

held that relief for violations of electoral rights protected under Title I was not preempted by Title IV of the LMRDA (Pet. App. B at 54), that Title I provided jurisdiction for the District Court to grant the relief it afforded Respondents (Pet. App. B at 58), and that the instant case did not concern "an election already conducted." (Pet. App. A at 67).

INTRODUCTION AND SUMMARY OF ARGUMENT

Ordinarily both the issues briefed and issues in actual controversy, and the relief sought and relief available would be the same, and no introductory statement distinguishing the two would be required of a respondent; the present case is far from ordinary in this respect. The arguments presented in the briefs of the Petitioner union and union officials, the Federal Respondent Secretary of Labor, and Amicus

Curiae AFL-CIO to which Respondents must reply have been considerably obfuscated and confused by these parties' having ignored significant many aspects of the proceedings in this case. The most significant of these was, as noted in the opinion of the Court of Appeals, that:

> The district court constructed a preliminary injunction that effected as little change as possible from terms which Defendants found acceptable... [M]any of the provisions of the injunction were included at the request of or with the agreement of the defendants, the objecting party here. Indeed, defendants appear to object specifically - we address elsewhere their general objection to any court-ordered election - only to two paragraphs of the injunction... They otherwise agree to the terms of the injunction.
> (Pet. App. B at 74).

The "court-ordered" election to which the Court alluded was the one which Petitioners in fact stipulated to conduct.

Despite these uncontestable facts, each of opposing parties' briefs proceeds as if

the entirety of the order of the District Court was imposed on Petitioners, objected to by them, and thus properly the subject of issues presented on the instant writ of certiorari. As a result they have collectively promulgated and discussed questions for review in support of requests for relief that are wholly out of place and that have not, since long before the issuance of the order of the District Court, been in controversy in the instant proceedings.

For this reason, it is crucial at the outset to set out precisely what this case does and does not concern. This case properly concerns the propriety of the District Court's having overseen the running of an election conducted in the wake of the Court's finding that violations of Title I of the LMRDA had occurred prior to the commencement of balloting in earlier

electoral proceedings, which the union subsequently declared null and void. It does not concern the propriety of the District Court's having enjoined an election from proceeding and/or ordered an election to be rerun. It does not concern the entry of orders affecting the conduct of "an election already conducted." And it does not concern the Court's having named third parties from outside the structure of an international union rather than parties from within it to supervise the conduct of an election.

Hence the Respondents first contend in Section IA, infra, that the chief issue, if not all the issues, Petitioners have raised by their petition on the instant writ fail to meet this Court's jurisdictional limitation to entertaining only actual cases or controversies and/or are so insignificant as to warrant a determination

that certiorari was improvidently granted.

In a similar vein, although Petitioners ask in their brief to this Court that "the Complaint be dismissed, the injunction issued dissolved, and the ballots cast in the December 13, 1980 election released to the Local Union" (presumably to be counted, following which the union would install the officers elected thereby into office), they have not asserted a single reason why this Court could or should afford such relief. This Court could only permit dismissal of the Complaint below if Petitioners were able to demonstrate that Respondents' Complaint failed to allege any claim cognizable under Title I. Yet the Petitioners have never even advanced such a contention, either before the Court of Appeals, or in this this Court. Short of that, this Court could only permit dissolution of the entirety of the

injunction below if it found both that the findings of the District Court were wholly erroneous,6/ and further that there were sound reasons disregarded by the District Court for releasing Petitioners from the stipulations they proferred to Court.7/

All that logically remains after such an analysis of relief Petitioners could possibly seek on the issues they have presented to this Court are only the following five requests:

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6. These findings were affirmed by the Court of Appeals and not made a part of the subject matter of the Petition to this Court.

7. As indicated in note 2, supra Petitioners did not request that relief of the District Court when the Judge therein inquired if that was what they desired. This issue was not appealed to the Court of Appeals or made a part of the subject matter of the Petition to this Court.

(1) to release and permit them to count the ballots from the 1980 election, despite the fact that Petitioners' stipulations have rendered these ballots devoid of any electoral significance; and/or

(2) to void the results of the 1981 election conducted under the Court's supervision and permit an unsupervised election to take place.

For this reason Respondents contend in Section IB, infra, that an examination of the relief this Court could afford to Petitioners reveals yet another reason why the instant writ should be dismissed as moot.8/

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8. Respondents wish to note two additional points about these arguments.

In the first place when Respondents raised one of these two claims of the absence of a controversy to this Court by motion, which this Court denied without prejudice prior to receiving Respondents' clarification of their motion, Petitioners replied that Respondents were erroneously contending that Petitioners had waived and could have waived a jurisdictional defect by stipulation. This was not and is not

In Section IIA, *infra* Respondents assert that the First Circuit Court of Appeals correctly determined that the relief afforded to them by the District Court was appropriate under Title I of the LMRDA in light of the legislative history of the Act, the nature of the violations found by the District Court, and appropriate policy considerations.

In Section IIB, *infra* Respondents assert in the alternative that the same history and similar policy considerations support the conclusion of the Court of

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the case. Respondents' assertion was and is that Petitioners cannot now object to orders which did little more than incorporate their own binding stipulations: i.e., Petitioners cannot base a claim of a jurisdictional defect, if any ever existed, that they voluntarily caused to cease to exist in fact and law.

In the second place it is not Respondents' contention that the entirety of the action they brought in the District Court is moot or will become moot for these reasons. Many issues raised in that action, which have not been appealed to this Court, remain very much alive and some remain which the District Court may yet have to adjudicate.

Appeals that the election of the Petitioner union had not been "already conducted" when the District Court afforded Respondents the relief and for that reason also the relief afforded by the Court was appropriate under Title I of the Act.

ARGUMENT

I. THE COURT SHOULD DISMISS THE INSTANT WRIT IN WHOLE OR IN CHIEF AS MOOT

A. THE ISSUES PRESENTED CHALLENGE ONLY ORDERS OF THE DISTRICT COURT TO WHICH PETITIONERS LARGELY STIPULATED OR ASSENTED, AND THEREFORE FAIL TO PRESENT A LIVE CONTROVERSY OVER WHICH THIS COURT CAN PROPERLY EXERCISE ITS JURISDICTION

The Federal Courts are without power to decide questions that are no longer live cases and controversies. North Carolina v. Rice, 404 U.S. 244, 246 (1971). "The inability of the federal judiciary to

review moot cases derives from Art. III of the Constitution." Defunis v. Odegaard, 416 U.S. 312, 316 (1974), citing Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964), Powell v. McCormack, 395 U.S. 486, 496 n.7 (1969), and Sibron v. New York, 392 U.S. 40, 50 n.8 (1968). The question of mootness is one which a federal court must decide before assuming jurisdiction or, having done so, before reaching the merits of a matter before it. North Carolina v. Rice, supra, at 246; Roe v. Wade, 410 U.S. 113, 125 (1973); SEC v. Medical Committee for Human Rights, 404 U.S. 403 (1972).

If any party's principal claim in an action has become moot, the Court may nonetheless retain jurisdiction over the case, but only to decide any unsettled claims or issues that may remain. Kremens v. Bartley, 431 U.S. 119, 129-130 (1977); United Public Workers v. Mitchell, 330 U.S.

75, 86-94 (1947); Powell v. McCormack, supra, 497-499 (1969), citing 6A J. Moore, Federal Practice s.57.13 (2d ed. 1966).9/ See also Muskrat v. U.S., 219 U.S. 346 (1911).

There is no case or controversy once the matter has been resolved whether by stipulations, assents or other voluntary action by the party seeking review which has rendered issues moot, Wright, Federal

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9. Professor Moore summarizes the rulings of this Court on the above question and the question of when intervening events or the passage of time render a matter moot. He says:

> One or more of the issues involved in an action may become moot prior to or during the trial of the action in the lower court. In this event the trial court should refuse to make an adjudication of the moot issue(s). If the non-mooted issues that remain are sufficient so that the action itself remains justiciable then the trial court properly proceeds to adjudicate those issues... similar principles apply where one or more of the issues become moot pending appeal or pending the decision of the appellate court... In the event the mooted issues are controlling, the appellate court should refuse to review the merits.
>
> 6 Moore's Federal Practice, Section 57, at 121-132 (2d. ed. 1966) (citations omitted).

Courts at 33 (1963). See Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498 (1911); and U.S. v. Anchor Coal Co., 279 U.S. 812 (1929). Those issues are no longer capable of being revi ewed. Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 334-40 (1980); Princeton Univ. v. Schmidt, U.S. , 102 S.Ct. 867 (1982).

It was the Petitioners' stipulation below, not the actions of the District Court, which caused the ballots to become null and void, and caused the election they now contend the District Court ordered them to conduct to be conducted.10/ Virtually

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10. This aspect of the mootness of the instant appeal fails to meet either of the tests of the "capable of repetition" doctrine discussed in Section IB, infra. For one thing these issues became moot not by fleeting passage of time, but by the voluntary action of the party who now seeks to have them reviewed. Furthermore they are, as will also be discussed in greater detail in said argument, highly unlikely to arise again between the same parties in the future.

the same results would have occurred as the direct consequence of Petitioners' stipulations had the Court below never entered any order but one dissolving that aspect of its temporary restraining order that prevented Petitioners from taking such steps as they proposed to take in their stipulations on their own. Where a party has accepted the security of a change of position or compromise, it cannot subsequently contend that it may appeal issues it compromised or settled out of the litigation. Donovan v. Penn Shipping Co., 429 U.S. 648 (1977); Marvirazon Compania Naviera, 674 F.2d 364 (5th Cir. 1982). There is no reason to treat any differently a party that has offered a voluntary, binding stipulation to serve its own intended purposes.

The present case does not as well raise any issue as to whether Section 403

of the Act preempts a Court from granting Title I relief with reference to "an election already conducted", for which relief is available under Title IV of the Act. The orders issued by the District Court came several months subsequent to the date on which the Petitioners' stipulations voided the ballots the union had sent out. At that point in time every conceivable aspect of the election to be conducted remained to be conducted; and the earlier election was in all respects voided ab intitio. The Petitioners offered their stipulations and the District Court accepted them with full understanding that they were proferred "to alter the context in which the Court (was) being asked for preliminary relief." (Jt. App. at 99) 11/

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11. See note 2, supra.

Having openly offered them for precisely this purpose, Petitioners can hardly now seek to challenge the subsequent action of the Court on the contention that the offer of the stipulations in no way affected that "context."

The same conclusion is manifest and inescapable when one considers the appointment of third parties to conduct the 1981 election in the union.12/

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12. As noted heretofore it was the Petitioners' own actions that resulted in the District Court's appointment of third parties not affiliated with the union tc supervise the new election. Although they initially stated that Teamsters Joint Council 10 was willing to conduct the new election (Jt. App. 104-105), the Petitioners subsequently informed the Court that Joint Council 10 refused to do so if it had to be accountable to the Court (Jt. App. 107-108). Though the Court several times asked the parties to suggest a suitable third party (Jt. App. 107, 111), the Petitioners never made any other suggestions or recommendations about possible third parties. As a result the Court had no choice but to appoint a third party of its own selection from outside the international union structure of Petitioners to conduct the election.

What remains at most in the case before this Court then is a writ issued on a petition challenging the District Court's determination, after having found that substantial Title I violations had been committed by the Petitioner union officers, that it would oversee the electoral process the union had stipulated it would conduct in 1981 rather than let the offending officers conduct it unsupervised. To the extent this issue remains, as is discussed in Section IIB, infra, it does so only in the context of relief granted under Title I prior to the time electoral processes have commenced, and is not open to challenge under the provisions of Section 403 of the Act.

B. EVEN BEFORE THE NEXT REGULARLY MANDATED ELECTION OF THE PETITIONER UNION OCCURS, THERE WILL NO LONGER BE ANY REASONABLE LIKELIHOOD EITHER THAT THE COURT WILL BE ABLE TO AFFORD THE PETITIONERS ANY RELIEF HEREON OR THAT THE SAME CONTROVERSY WILL ARISE BETWEEN THE SAME PARTIES IN THE FUTURE

Even assuming that the District Court ordered what Petitioners contend it did, to the extent that order is challenged herein, it is or soon will become moot in a second respect. The order is presently only "live" because the officers elected pursuant to them are now serving out the end of their term of office. Once they have left office, even the minimally important relief that Petitioners could request herein will be beyond the power of this Court to grant.13/ This is because by

13. Petitioners are required by both LMRDA and its own Constitution and By-Laws to conduct a new election of officers in November and December of this year, and install them in office in January of 1984.

mandate of 29 USC 481(b) and the Constitution of the Petitioner Local Union the next regularly-scheduled election in this local union and installation of new officers will have to occur before this Court will rule upon the issues presented by this petition,14/ as the Secretary of Labor concedes (Brief for Federal Respondents, n.21 at 45).

A ruling by this Court would have to come long before the January, 1984 installation date of new officers to affect the rights of the parties, if this Court deems that the District Court should have permitted an unsupervised election to take place as Petitioners' stipulations proposed. This is because the election processes themselves would take several months time before new officers could be nominated, elected and installed. Hence the Court would have to issue such a ruling on or before the date oral arguments are tentatively scheduled to be held in this case. Likewise, once the 1983 electoral process has been commenced, none of the relief Petitioners can or do seek by its appeal can be affected by this Court. Hence this action will, if it is not already, become entirely moot before this Court can fully adjudicate any of the issues pending before it.

While it is true that in a limited number of circumstances issues or actions that have become moot may thereafter be reviewed, they may only be so reviewed when they meet the following two stringent requirements:

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14. The Secretary argues that this action will not be moot by the time the Court hears it because the intervention of an election does not cut off the Secretary's right under Title IV to exercise his statutory authority with regard to a preceding election. This argument is wholly inapplicable to the instant circumstances. In the first place the decision in Wirtz v. Glass Bottle Blowers Association, 389 U.S. 463 (1968), cited by the Secretary, is not on point because this is neither a Title IV case, nor one where the Secretary has exercised or could at this late date exercise any statutory authority. Additionally, Respondents note that they do not contend the case below will become entirely moot once an election takes place, but rather contend only that he orders which are the sole subject of the instant petition will have become moot once such an election transpires and unsusceptible to remedy by this Court even before that date. Hence even if the logic of the decision in Wirtz cited by the Secretary, applied to the instant case, it would not have any relevance to the questions presently raised by this appeal and the request that it be dismissed as moot.

> "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and
>
> (2) there was a reasonable likelihood that the same complaining party would be subjected to the same action again." (emphasis added)
>
> Weinstein v. Bradford, 423 U.S. 147, 149 (1975); Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 187 (1979); SEC v. Sloan, 436 U.S. 103, 109 (1978); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 774 (1978). See generally Sosna v. Iowa, 419 U.S. 393, 399-401 (1975).

Thus, based on this narrow exception to the doctrine of mootness, the Petitioners can only avoid dismissal of this writ if they are able to demonstrate that these parties are likely in the future to end up in the same situation again.

> "It is not enough that a federal court may again be called upon to decide the legal issue raised in this litigation. Rather, there must be a reasonable degree of likelihood that this issue will be the basis of a continuing controversy between these two parties. Central Soya Co. Inc. v. Consolidated Rail Corp., 614 F2d 684, 689 (7th Cir. 1980)."

In this case the two Petitioner officers found to have violated the Respondents' rights and the Local are under an outstanding order, not the basis of this appeal or otherwise contested, to refrain from violating those rights in the future. Given the fact that some of the Respondents are no longer in the union and one of the two Petitioner officers no longer in office, and an order, the validity of which is not challenged, is outstanding which prohibits the Petitioners from repeating such illegal actions, there is virtually no chance of a recurrence of the complained of conduct and hence another order enjoining a future election issuing on said account. See Central Soya Co., supra at 689. See also Alyeska Pipeline Service Co. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 959, 535 F.2d 66 (9th Cir. 1976).

> Speculative contingencies afford no basis for [our] passing on [the] substantive issues [the petitioner] would have [us] [the Court] decide[d], Hall v. Beals, 396 U.S. 45, 49 (1969), in the absence of evidence that there is a prospect of immediacy and reality. Golden v. Zwickler, 394 U.S. 103, 109 (1969); Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941). DeFunis v. Odegaard, supra at 320, n.5. See also City of Los Angeles v. Lyons, U.S. , 103 S.Ct. 1660 (1983).

Similarly the mere possibility that the Court below might issue further orders in the future is too speculative to provide a basis for review of the soon to be mooted orders of the Court below.15/

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15. The Secretary also argues that this action is not moot because the District Court could at sometime in the future conceivably issue an order about future actions of the local and its officers. This reason too fails to justify this Court's reviewing the instant case. The fact that the Court below might issue other orders in the future in this case has no bearing on the question presented by the instant appeal and Respondents' request that it be dismissed. If the District Court does issue such an order, review would only be appropriate after its issuance.

Hence in Canez v. Guerrero, 707 F.2d 443 (9th Cir. 1983), a case nearly identical in most respects to the instant case, the Ninth Circuit Court of Appeals recently decided that an appeal to it from orders concerning a union election was moot for the very reasons Respondents herein urge the instant one is moot.

II. THE PRELIMINARY INJUNCTION ISSUED BY THE DISTRICT COURT WAS WITHIN THE SCOPE OF ITS AUTHORITY

A. SECTION 403 OF THE LMRDA DOES NOT BAR A COURT'S GRANTING INJUNCTIVE RELIEF AFFECTING THE CONDUCT OF AN ELECTION WHEN TITLE I OF THE ACT HAS BEEN VIOLATED

(1) The Legislative History Of The LMRDA Demonstrates That Congress Adopted Title I To Provide Additional Rights Protecting Democratic Activity Of Individuals And Groups Of Union Members In Elections, And Intended That Those Rights Be Enforced Privately And By Injunctions.

The legislative history of Titles I and IV do not demonstrate, as Petitioners,

the Secretary and the AFL-CIO contend, a clear Congressional intent to vest in the Secretary the sole authority to afford any relief affecting the processes by which elections are conducted, to restrict Title I relief concerning election violations to suits for damages, or to restrict Title I by providing only damages as relief for violations thereof. Nor does the Congressional history evidence so great a desire to preserve the autonomy of union internal functionings as these parties' briefs contend. Rather, Congress' intent on these issues is at best ambiguous or unstated on some of these questions,16/ and

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16. "The legislative history of the LMRDA does not conclusively explicate the intended relationship of Titles I and IV, because Congress never seriously considered the interplay question: indeed, Congress was barely aware of its existence. Although both titles were products of the McClellan hearings of 1958, the provisions that now comprise Title IV were drafted, debated and approved by the Senate before Title I was introduced. Congress's

quite contrary to what these parties assert on others. This is reflected, as the First Circuit Court of Appeals and many others have noted, in the Congressional debates, the resultant language of the Act, and an analysis of that language in the context of the goals expressed by Congress in the "Declarations of Findings, Purposes and Policy" preceding the substantive provisions of the LMRDA (hereinafter referred to as Congressional policy statement) 29 U.S.C. 401.

Two critical points about the analysis of Congressional intent proffered by

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intention that suit by the Secretary of Labor be the exclusive post-election remedy under Title IV cannot, therefore, be extended to Title I suits in the absence of specific provision for such an extension. Only affirmative evidence from the legislative history of Title I could require that extension. Affirmative evidence would also be required to justify subsuming Title I's enforcement procedures under those of Title IV in the pre-election overlap cases." Note; "Union Elections and the LMRDA: Thirteen Years of Use and Abuse," 81 Yale L. J. 407 (1972) at (emphasis added). See also Harris, "Titles I and IV of the LMRDA: A Resolution of the Conflict of Remedies," 42 U.Chi. L. Rev. 166 (1974) at 177.

Petitioners and their supporters need to be made at the outset of this discussion. In the first place the briefs of the Petitioners and their supporters overlook the forest for the trees in describing what Congress' intent was even, as to Title IV of the Act standing alone. As the Court of Appeals also noted and considered (Pet. App. B at 51), these parties' brief correctly point out that Congress, in passing Title IV, was "guided by the general principles that unions should be left free to 'operate their own affairs, as far as possible.'" Steelworkers v. Sadlowski, U.S. __ ,102 S.Ct. 2339, 2348 (1982). However, that principle was not the only one or the overriding one guiding Congess in enacting Title IV. The primary purpose of Congress in enacting Title IV and the LMRDA as a whole was to curb the types of abuses enumerated in the

Congressional policy statement 29 U.S.C. 401, and guarantee that officials of labor organizations "adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations." 29 U.S.C. 401(a). The type of abuses Congress sought in particular to correct were "breach of trust, corruption, (and) disregard of the rights of individual employees."17/ 29 U.S.C. 401(b)

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17. "The Select Committee on Improper Activities in the Labor or Management Field (the McClellan Committee) extensively investigated the abuses of union leaders and the relation of organized crime to organized labor, ultimately finding 'a significant lack of democratic procedures in the unions studied.'" (footnotes omitted) 42 U. of Chi. L. Rev. at 176. See also note 19, infra and Estreicher, "Pre-Election Remedies Under the Landrum-Griffin Act: The 'Twilight Zone' Between Election Rights Under Title I and V", (hereinafter "Twilight Zone"), 74 Col. L.Rev. 1105.

It is difficult at best to reconcile the conclusions regarding Congress' intent reached by Petitioners and their supporters with these expressed Congressional goals. But virtually ignoring these goals is only the first of several shortcomings of these parties' analyses of the history and intent of Congress in enacting Titles I and IV of the Act.

The second shortcoming of these parties' analyses arises from their lumping together the two steps of the process that lead to the enactment of Titles I and IV, and correspondingly assuming that Congress' purposes regarding Title IV should and could be automatically transferred intact to explain Congress' intent in adopting Title I. Given the very different character of rights protected under Titles I and IV, and the different means Congress elected to enforce them, there is no sound

basis for presuming that such a wholesale transfer is appropriate.18/

Title IV of the Act deliberately made its way through Congressional committees over the course of several years; Title I was put together in two steps over the course of a few days on the floor of Congress. The history of the Senate Committee which reported out S. 1555, the bill that went to the Senate floor containing provisions similar to the present Title I, is chiefly helpful in interpreting Title IV of the Act (Pet. App. B at 56). The keystone for interpreting Title I is the fact that, on seeing Title

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18. "Although Title I was introduced in response to the inadequacies of the Title IV measure, Congress gave little express consideration to the interrelationship of Titles I and IV. It should not be assumed from the silence of the legislative history on this point, however, that legislators who were determined to transplant constitutional guarantees into the internal union arena, despite the intensive lobbying efforts of organized labor, intended to render Title I nugatory with respect to all election-related practices." "Twilight Zone," 74 Col. L. Rev. at 1125 (footnotes omitted).

IV as reported out of Committee and ultimately adopted by Congress, "Senator McClellan and other legislators feared that the bill did not go far enough because it did not provide general protection to union members who spoke out against the union leadership." Steelworkers v. Sadlowski, 102 S.Ct. at 2344 (emphasis added).

That Congress intended to remedy this problem by enactment of Title I and that it intended that the rights protected thereunder extend to union elections as well as in other union processes is a fact the Secretary and this Court have long heretofore recognized. Hence in Wirtz v. Hotel Employees Union, 391 U.S. 492, 497-8 (1968) this Court stated:

> A pervasive theme in the Congressional debates about the election provisions... is made explicit in the reports of the Labor Committees of both Houses of Congress. It is reflected in the discrete provisions of Title IV and also of Title I, the 'Bill of Rights' for union members. (emphasis added).

Hence too the Secretary's regulations concerning union elections state that Title I rights apply to electoral processes of unions. 29 CFR 452.7 And finally for the same reason this Court recently pronounced:

> Congress recognized that democracy would be assured only if union members are free to discuss union policies and criticize the leadership without fear of reprisal. Congress also recognized that this freedom is particularly critical, and deserves vigorous protection, in the context of election campaigns. For it is in election campaigns that members can wield their power, and directly express their approval or disapproval of the union leadership.
> Steelworkers v. Sadlowski, supra, 102 S.Ct. at 2346 (emphasis added).

In seeking to protect these rights - in particular the rights of union dissidents and minorities - which Congress recognized the other titles of the Act did not do, Congress provided in Title I for the protection of the most fundamental of democratic rights - the right to be free from discriminatory treatment in

nomination, election, referendum and other decision-making processes of union (Section 101(a)(1)), the right of free speech and assembly (Section 101(a)(2)), the right to sue (Section 101(a)(4)) and the right to have certain procedural due process protections in disciplinary proceedings (Section 101(a)(5)). Congress consciously made these guarantees specifically applicable to the very electoral processes it also regulated under Title IV of the Act.

There is no support in the language of the Act or the history of Title I for the proposition that Congress intended to have Title I rights enforced in the same fashion as Title IV rights, or else not enforced at all.19/ Indeed, that Congress did not have

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19. "Neither the floor debates not the Senate and House reports indicate a Congressional intention to subsume the Title I enforcement procedures under those of Title IV in overlap cases." "Remedies," 42 U. Chi. L. Rev. at 178-9 (emphasis added)

precisely the same goals in enacting Titles I and IV, and did not intend for Title IV's enforcement processes to swallow up Title I election rights is evident from both the specific provisions of Title I and the history of its adoption. The nature of the rights protected by Title I and the mechanism for enforcing them respectively were and needed to be different from the nature and mechanism for enforcement of Title IV rights was explicitly recognized by Congress. The Senate, after adopting an amendment providing for enforcement of Title I rights by the Secretary, by a vote

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"Total preemption of Title I relief by Title IV in the area of elections is belied by the legislative history of the LMRDA... Congress added Title I at least partly in response to fears that Title IV was not strong enough to effectuate the central purpose of the LMRDA, the preservation of union democracy. Calhoon v. Harvey, 379 U.S. 134 (1964) (J. Stewart, concurring at 146) (citations omitted).
See also Kupau v. Yamamoto, 622 F.2d 449, 455 (9th Cir. 1980).

of 47 to 46, immediately and specifically thereafter adopted an amendment, taking this enforcement mechanism out of the hands of the Secretary by an overwhelming vote for very deliberate reasons. A. Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 832-3 (1960). The House adopted the change for particular though different reasons, which were also consciously considered and, as discussed hereinafter, are germane to the issues presently before the Court.20/

The Congressional record is also clear that, even before amending Title I to provide for private enforcement, Congress contemplated that the mechanism for

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20. The House was concerned with the vast increase in scope of the Secretary's operations that might result under Title I and resulting vast increase in budgetary needs for the Labor Department (See remarks of Cong. Teller, 105 Cong. Rec. 15681-82 (1959)).

enforcing Title I rights would be different from that provided in Title IV. Hence injunctive relief and damages were both always contemplated and included as remedies under Title I, though neither was a specified remedy in Title IV.21/ So too the remedies in Title I, being intended to protect the most fundamental of democratic rights, were not subjected to the limitations imposed in Section 402(c)(2), which provides that violations of Title IV shall be redressed only if they "may have affected the outcome of an election." 29 U.S.C. 482(c)(2).

In a similar vein Congress did not show the same deference to intra-union dispute resolution processes in Title I that it showed in Title IV. The different

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21. When Title I was first added to the Act it provided for enforcement of rights thereunder by the Secretary of Labor. Even then enforcement was not through the procedures of Title IV, but by an action for appropriate relief including injunctions (105 Cong. Rec. 6476 (1959)).

exhaustion requirements of Sections 101(a)(4) and 402(a)(1) and (2) underscore the differing degrees of deference to union autonomy Congress determined were appropriate considering the difference between the nature of the rights protected under the separate titles. While Title IV insures some union autonomy by making three months of exhaustion a prerequisite to governmental remedial action with reference to more technical violations of electoral rules and generally unfair restrictions applied uniformly to all members, there is little indication that Congress thought that union officials who have discriminated against or deprived their members of their most fundamental rights would or could necessarily correct such abuses internally.22/ Indeed, the extensive

history of abuses of power uncovered by the investigations of the McClellan Committee suggested that the contrary, if anything, was anticipated: i.e., that the rights protected by Title I, being in their nature more generally-phrased protections against discriminatory treatment by union officials, are inherently less likely to be subject to correction by the very persons who engaged in the wrong than are the rights protected by Title IV.

It is not surprising that Petitioners,23/ the International

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22. "The Congressional solicitude for union self-regulation and wariness of judicial intervention evidenced in Title IV are not characteristic, however, of the other titles of the Act. In particular, Title I and Title V, both susceptible of application in the election context, are enforceable by direct member suit without mediation by the Secretary". "Twilight Zone," 74 Col. L. Rev. at 1107-8. (footnotes omitted).

23. The local union and its chief officer herein have been found guilty of precisely the kind of abuses of power Congress sought to eliminate - not minimally regulate - when it passed Title I.

Brotherhood of Teamsters,24/ and the AFL-CIO 25/ view the provisions of the Act they vigorously opposed and its legislative history in the fashion they do. Nor is it surprising 26/ that the Secretary of Labor, whose budget and role was severely restricted by the Kuchel Amendment and

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24. Petitioners' International, by whose legal counsel the local and its officers are represented herein, is one with a long as well as recent history of abuses of the LMRDA and other acts of Congress.

25. As noted in Calhoon, supra (J. Stewart, concurring at 144), organized labor opposed passage of the LMRDA.

26. "In every major court case involving the right of complainants to seek direct recourse in court to assert the LMRDA rights, the DOL has favored restrictions on that right." H. Benson, "Union Democracy and the Landrum-Griffin Act", Vol. 11, No. 1 N.Y.U. Review of Law and Social Change 153 (1982-83), citing 81 Yale L.J. 409, Calhoon, supra, Trbovich v. United Mine Workers, 404 U.S. 528 (1972), Dunlop v. Bachowski, 421 U.S. 560 (1975), Brennan v. United Steelworkers of America 554 F.2d 586 (3rd Cir. 1977), cert. den. 435 U.S. 977 (1978). (footnotes omitted)

whose performance in enforcement of Title IV of the Act is less than praiseworthy,27/ concurs in their view of this Act and its history. However, the fallacy of their views, which in essence argue for a total rewriting of Title I, are as evident as their subjectivity.

Two of the reasons Bensen notes for this phenomenon are:

> The desire of the Secretary of Labor to remain on the good side of union leaders may be political: unions may help to reelect the President under whom the Secretary serves. This motivation on the part of the Secretary plays a significant role in shaping Department of Labor policies. An added complication is that, among secretaries identified with unions, some are actually former union officials.
> "Union Democracy," 11-1 N.Y.U. L.S.C. at 162 (footnotes omitted).

27. The numerous instances demonstrating the proposition that "the Labor Department [has a] poor record in enforcing the LMRDA" as well as the reasons for that poor record are discussed in some depth by Herman Bensen in his previously cited commentary. See note 26, supra. Bensen notes that the Department's record reveals that:

> (a) the Secretary of Labor may often "cozy up" to union leaders, placing a heavy burden on opposition candidates who file

complaints to prove they could have won an election against the incumbents (at p. 159);

(b) the Department of Labor has slanted decisions in favor of incumbents (at p. 160, citing "How the U.S. Labor Department Whitewashed Election Fraud Despite Federal Judge and New York Grand Jury", Union Democracy in Action, Feb. 1968 at 1. Schonfeld v. Wirtz, 258 F. Supp. 705 (S.D.N.Y. 1966); Schonfeld v. Raftery, 271 F.Supp. 128 (S.D.N.Y. 1967), aff'd, 381 F. 2d 446 (2d Cir. 1967); and

(c) recommendations for Court actions to overturn illegal elections made by regional compliance officers (career employers) are regularly vetoed by political appointees in the D.O.L. Washington headquarters at rates estimated to be as low as ten percent in some areas and as high as sixty-five percent in others (at p. 163, citing D. McLaughlin & Schoomaker, "The Landrum-Griffin Act and Union Democracy" (1979)).

Bensen contends that this record "demonstrates [the Department's] reluctance to perform what it views as an unwelcome task. Part of the reason for this reluctance is that the Department's responsibility to enforce the Act runs counter to its principal function. Generally, the Labor Department's responsibility is to serve labor, much as the Department of Commerce is supposed to serve business." He further notes, "In order to avoid strikes and foster friendly relations between unions and management, the Department tries to maintain cooperative and amicable relations with labor leaders... It is paradoxical that the Department which is compelled to maintain close ties with union leaders is also expected to adopt an adversarial position toward them in enforcing the LMRDA enforcement agency." "Union Democracy," 11-1 NYU L.S.C. at 162-3.

Petitioners, the Secretary and the AFL-CIO urge the Court to find that Congress intended that the federal courts disregard all Title I violations affecting the processes by which elections take place, except for those raised by the Secretary in Title IV proceedings and except for awarding damages to the victims of such violations who bring suit under Title I.28/ Not one of their Briefs cites a single Congressional statement to such an effect; rather they infer such an intent through a two-part "logical" process.29/

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28. Brief for Federal Respondent, n. 20 at 44; and Brief for AFL-CIO, n. 3 at 6. It is somewhat ironic that the AFL-CIO takes this posture since it also extensively argues that Title I relief should be limited by traditional principles of equity (Brief for AFL-CIO at 16-21).

29. They also argue that policy considerations support this proposition. These are discussed in the Section IIB(2) infra.

First they disregard all the statements of Congressmen, the language in the Act, commentators' views and pronouncements of courts discussed above. They justify disregarding all the evidence contrary to their position in the language of the Act by attributing the existence of that language to oversight on the part of Congress. They argue the oversight occurred due to "haste", "no discussion", "work... done late at night", "a flurry of activity", "copies of it... [not being] available to members of the Senate until the next day, when it passed," and "parliamentary law [rendering] the conferees... powerless to revise" its provisions. Brief for Federal Respondent at 13-21.

The second part of the process by which they reach this conclusion is by inferring it from two statements contained

in Title IV of the Act: the first being the language of Section 403 providing that the remedy thereunder is "exclusive" for challenging "an election already conducted"; the latter being the proviso of Section 402(a) for presuming the challenged election valid pending Court action.

In response to the first of these points - oversight on the part of Congress - Respondents simply say that the suggestion of oversight and error on the part of Congress is belied by the fact that Congress could not have so wholly overlooked either the words regarding elections and remedies in Title I, or their evident meanings. Furthermore it is belied by the numerous expressions, noted heretofore, of members of Congress that Title I was needed because sufficient protection for dissidents, such as Respondents, was not provided in the context of elections under Title IV.30/

As to the first part of their second point - that Title IV is the exclusive remedy for challenging an election already conducted - Respondents note that the Congressional record is quite clear that the "exclusive remedy" language of Section 403 was directed not at Title I rights, but at the panoply of diverse state laws governing union elections. The intent of Section 403 was to bar "state regulation of union elections... in the interest of uniformity" for the several reasons noted by Professor Cox in his aforecited article. "Internal Affairs", 58 Mich. L. Rev. at 846. Hence the First Circuit correctly found little or no support for these parties' arguments to the effect that this language of Section 403 was directed to or applicable to the enforcement of rights under Title I. Rather the Court concluded

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30. See note 19, supra.

correctly, as this Court also noted in Trbovich v. United Mine Workers of America, 404 U.S. 528 (1972), that:

> The debates reflect great concern with the proper relationship between state and federal remedies, and much less concern with the relationship between private and public enforcement.
> 404 U.S. at 534, n. 6

Furthermore, an examination of the reasons underlying the adoption of the "exclusivity" rule of Section 403 suggest no basis for concluding that Congress intended that the same rule should be applied to Title I violations. Indeed the reasons set forth in Professor Cox's article belie the Petitioners', Secretary's and AFL-CIO's suggestions that the reason for the adoption of this bar was to give the Secretary, rather than the Courts, control over all aspects of union election violations. This position too is irreconciliable with the uncontestable facts that Congress intended to provide and

did in fact provide for protection of certain electoral rights in Title I; and consciously voted by an overwhelming majority to revoke the provision originally therein for the Secretary to enforce these I rights.

As to the latter part of their second point - that an election is presumed valid - Respondents again note that there is nothing in the Congressional record to suggest that Congress intended that officials who violated Title I of the Act be installed in the offices they stole for several years pending the processes provided for under Title IV.

Additionally there is no inherent inconsistency between the provisions of either of these Titles and the granting of injunctive relief under Title I. Quite to the contrary, there are three very sound

reasons for concluding that Congress did not necessarily intend that the status quo provided in Title IV while Title IV violations are being litigated be applied under Title I where violations thereof are being litigated.

The first of these three reasons is simply that Congress provided for that status quo explicitly in Title IV and did not do so in Title I or make it applicable to existing state law remedies.

The second of these reasons reflects the differing nature of rights protected under Titles I and IV. Where union officers are newly elected as a consequence of their intentional discrimination against some of their membership, there is considerably less justification for installing them in office than where their election may have occurred because of a violation of some more technical

requirement of Title IV of the Act. There is nothing in the Congressional history to suggest that, when the fundamental rights protected by Title I are violated, Congress intended to have the perpetrators installed in office and allowed to reap the fruits of their misdeeds for the better part of the term of office they may have stolen. The instant case provides a good example of why Congress might have felt that injunctive relief might be necessary: the Petitioner officers first unlawfully locked their most ardent critic out of the nominations meeting and then insured that Petitioner Griffiths ran unopposed by failing to properly record the nomination of one of the Respondents to oppose him (Pet. App. A at 21).

Additionally the different processes provided under the two titles also explain why Congress would have provided for

judicial discretion on this point under Title I and a clear rule on it under Title IV, just as it did with internal union "exhaustion" requirements discussed above. The process for remedying violations of Title IV is slow by its very nature. Before a court can conclude that a violation has occurred, a process of at least four months time must transpire before an action is filed before it; and not until long thereafter does a trial on the merits of that action take place. Such a process will by definition take at least six months and up to several years before issuance of a decision on its merits. On the other hand, Title I specifically provides for direct appeal to the Courts, for discretionary waiver of exhaustion requirements, and for issuance of injunctive relief. In all probability such a process can proceed to at least a

preliminary conclusion in a few months time. Congress, mindful of how long it could take to reach a judicial determination regarding the propriety of an election challenged under Title IV of the Act, resolved the question of who should hold union office in the interim, absent a provision governing this question in the constitution of a union,31/ for the following reasons:

> A union election should be presumed valid until the contrary can be reasonably presumed. The newly elected officers are those most likely to have the support of the members.32/

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31. Both the Secretary and AFL-CIO assert that the District Court's order was "contrary to the spirit if not the letter of 29 U.S.C. 482(a), which expresses a preference for allowing new officials to take office pending a final decision." (reference to Briefs) In so arguing both ignore the fact that this section of the Act actually provides in the first instance for a union constitution and by-laws to resolve who holds office pending resolution of a Title IV complaint. Only if not provided for therein do the newly elected officers automatically take charge of the union under the Act. Furthermore they

Application of this logic to Title I remedial processes does not lead one to the conclusion Congress reached and explicitly set forth in Title IV. Under Title I the invalidity of an election may be reasonably presumed as soon as in a matter of weeks by a preliminary judicial determination. Once a determination has been made that an election was invalidly conducted, the "newly elected officers [will not

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presume once more that the Court imposed this "contrary" scheme on the parties, when in fact the District Cout asked the parties for their views on this matter and Petitioners suggested that this should occur. Hence the union, not the Court initially decided this question. Hence too the Congressional goal of union autonomy was not frustrated by how the District Court handled this question under title I in this particular case. Indeed, the union conceivable could have appointed interim officers by vote of members attending the next membership meeting. Had Petitioners suggested the same to the Court or some other democratic alternative, there is no reason to presume either that the Respondents would not have agreed to the same, or that the Court would not have permitted it.

32. These two sentences were deleted from the legislative history quoted in the AFL-CIO's brief (note 16 at 10-11).

necessarily be] those most likely to have the [continued] support of the members."

Finally note must be made regarding the concessions of both the Secretary and AFL-CIO that not all Title I post-election relief is barred by Section 403, and their contention that Title I relief should be restricted to granting money damages.33/ (Brief for Federal Respondent at 10. The same contention is made at Brief for AFL-CIO at 10.) This assertion is unsound for several reasons. Title I, as noted above, specifically mentions injunctive relief as an available remedy.

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33. Damages awarded to dissidents against their union would, if substantial, in all probability result in a special dues assessment being made against the membership, as was done in this case simply to raise money to pay lawyers to pursue appeals. This would in most cases, as it has in this case, only serve to cause the victims of unlawful discrimination to be resented by many other union members. Such a result does not promote democracy and protect the rights to dissidents, but rather frustrates both ends.

Furthermore, given the nature of the rights protected under Title I, damages are in all probability the least appropriate form of relief possible; for such an award would not effectuate any of the purposes of the Act. Rather, in most cases it would have the opposite effect.

(2) The Different Nature of Rights Protected Under Titles I and IV Casts Serious Doubt That Title I Rights In Elections Could Be Effectively Protected By Action Of The Secretary Under Title IV Or By Precluding Injunctive Relief Under Title I

The Secretary, the Petitioners and the AFL-CIO all argue that the Courts below should have declined jurisdiction over and/or declined to grant relief remedying the violations of the Act which the Respondents established in the District Court. Rather, they assert that correction of these violations should have been left

to the Secretary to accomplish. In fact, however, this argument is misleading, because none of these briefs establishes, on the facts of this case and generally as well, that these or like violations could have been redressed by the Secretary under Title IV.34/ Given the facts discussed below, they implicitly argue that most of these violations should be left for the union to remedy or not remedy as it chooses.

The two violations complained of and the subject of the instant appeal, and a third one not appealed are violations the Secretary has no power to redress under Title IV, as he recognizes in his regulations:

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34. The Secretary's Brief assumes these violations and most others occurring after a mail ballot is sent out will be both Title I and Title IV violations; perhaps for that reason he assumes Court enforcement of Title I rights violated "during that period" "trenches on the authority of the Secretary" (Brief for

> The provisions of Title I, 'Bill of Rights of Members of Labor Organizations' (particularly section 101(a)(1) 'Equal Rights', section 101(a)(2) 'Freedom of Speech and Assembly' section and 101 (a)(5) 'Safeguards against Improper Disciplinary Action') are related to the rights pertaining to elections. [Nevertheless] Direct enforcement of Title I rights, as such, is limited to civil suit in a District Court of the United States by the person whose rights have been infringed. 29 C.F.R. 452.7 (emphasis added).

Federal Respondent at 7 & 8). Yet in fact he recognizes only the misnomination of Lynch as cognizable under Title IV (Id. at 11) and would provide redress for such a violation only if he credited Respondents' rather than union officials' version of the meeting. To prove this to the Secretary's satisfation Respondents would, of course, have no opportunity to cross-examine union officials to impeach their credibility as they do in the Court system. Not only in this case, but in many others the Secretary's enforcement of Title IV will not redress Title I violations. As noted in one comment on this subject:

> From a practical standpoint, however, the manner in which the Secretary enforces Title IV (discounting the limitations inherent in the post-election remedy itself) in many instances effectively deprives the complainant union member of any redress and leaves largely unvindicated the public interest in internal union democracy.
> "Twilight Zone," 74 Col. L. Rev. at 1117.

Unless also violations of Title IV, conduct violating Title I cannot give rise to redress under Section 403. Hence Title IV would not protect any Respondent's rights "to express at meetings of a labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting",35/ and not to "be fined, suspended, expelled or other wise disciplined" in reprisal for exercising rights protected under Title I and by procedures guaranteed thereunder.36/

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35. Section 101(a)(2) of the Act.

36. Sections 101(a)(5) and 102 of the Act. Section 401(e) only protects a member against discipline or reprisals on account of having exercised certain limited, specific rights thereunder. These include being or supporting a candidate, or voting in an election, but do not include protesting unreasonable rules or seeking to attend a meeting.

Furthermore, according to the Secretary's regulations, the denial of one member's "equal rights" to nominate candidates does not constitute a violation of Title IV's general guarantee of "a reasonable opportunity... for the nomination of candidates".37/

In the second place, even where actions violate Title IV, as the Court of Appeals noted, they are often not ones for which the Secretary would not choose to or could not grant redress:38/

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37. See 29 C.F.R 452.7; 29 U.S.C. 481(e); Note also that 29 C.F.R. 452.55-452.65 nowhere guarantees the rights of individuals to nominate candidates.

38. As noted by Justices Stewarts and Harlan in the former's concurring opinion in Calhoon, supra, citation below:

> The Court's reading of federal-court remedies available under Title I and Title IV is particularly restrictive because of the limited powers of the district judge once the balloting has occurred. Under s. 402(c), the court is confined to setting the election aside only if "the violation of section 401 may have affected the

> outcome." For the aggrieved union member this protection may be totally inadequate. The function of nominating a candidate is not always to gain the office. A faction may be vitally interested in appearing on the ballot merely to show that it is part of the political structure of the union. Under the Court's view, until such a faction approaches majority status, judicial relief in the federal courts will be absent. See Summers, Judicial Regulation of Union Elections, 70 Yale L. J. 1221, 1257 (1961).
> 379 U.S., at 146, n. 7 (emphasis added)

This same point is made a decade later in the aforementioned Columbia Law Review article, wherein that commentator notes that "the policy considerations underlying the Calhoon decision are inapposite with respect to Section 101(a)(2)." That commentatary states:

> Violations of Section 401 without the requisite probable effect are without remedy under the title; incumbents are thus licensed to violate Title IV with abandon as long as their opposition remains an electoral minority. Regardless of the flagrancy of the incumbent's conduct during the first election or the extent to which he has impaired the democratic spirit within the union, he is permitted a second chance to retain power. The actual victor of the first election may never achieve installation, for if section 401 violations mar the rerun as well, the burden is on him to file a complaint with the Secretary and begin anew the cumbersome Section 401 process.
> "Twilight Zone", 74 Col. L. Rev. at 1116.

> Relief for violations under Title IV is possible only if the wrong 'may have affected the outcome of an election.' 29 U.S.C. 482 (c)(2); see 29 C.F.R. 452.5. This test is mathematical: The Secretary of Labor will litigate under Title IV only if the number of affected ballots would have changed the outcome of the election... The result is obvious: flagrant violations may go unremedied if the number of affected ballots is too small.
> Pet. App. B at 65-66.

The exclusion of Respondent Crowley from the nominations meeting and discipline of Respondent Lunnin thereafter, if arguably Title IV violations, would not likely be viewed as arising to the level of "affect" that could enable the Secretary to redress them. In all probability the only part of the election the Secretary could or would have ordered rerun under Title IV was Griffith's running unopposed for the Secretary-Treasurer position.39/ Yet this is the most powerful office in the local

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39. Brief for Federal Respondent at 11.

union and violations regarding it could have tainted the entire election process in ways impossible to determine mathematically. In a similar context, the Second Circuit Court of Appeals recognized that under Title IV there often is no remedy for the fact that "Once suppressed 'the democratic spirit' within a union 'may not soon be revived'. Navarro v. Gannon, supra [385 F.2d 512 (2d Cir. 1967), cert. denied, 390 U.S. 989 (1968)]; 385 F.2d at 520." Schonfeld v. Penza, 477 F.2d 899, 903-4 (2d. Cir. 1973).

In the third place the particular electoral processes challenged in this case, as has been noted above, occurred in an election that the union voluntarily voided and bound itself to rerun within three months time subsequent to the close of balloting. For this reason too in this case the Secretary would be completely

powerless to grant Petitioners any redress for the violations having occurred or any guarantee that they would not have been repeated in a rerun election.

For these three reasons adoption of Petitioners' view of the Act would frustrate the Congressional objective of providing special protection to the fundamental rights guaranteed in electoral processes by Title I. No protection for Title I rights would be afforded except by voluntary action of the offending union whenever offenses which the Secretary of Labor cannot redress for any reason occur in the context of an election. In accord with this view of the Act is the recent decision of the Ninth Circuit Court of Appeals in Canez, supra.

(3) The Fact That The Secretary Of Labor Could Protect Some Title I Rights Without Permitting Pre- Or Mid-Election Injunctive Relief Under Title I Does Not Constitute A Sound Basis For Precluding Injunctive Relief Affecting Electoral Processes Under Title I

The Secretary of Labor premises many of his arguments on the assumption that the violations complained of herein could be remedied under Title IV as well as Title I and argues that the Title I remedy is preferable for the following five reasons:

> [a] avoidance of delay in the conduct of union elections; [b] resolution of such problems, where possible, by the union itself; [c] screening of frivolous complaints and [d] consolidation of apparently meritorious ones by the Secretary; and [e] reliance on the Secretary's expertise in supervising remedial elections.
> Brief for Federal Respondent at 6 (lettering added).

Though the Secretary's basic premise is, as discussed above, not a sound one, these five reasons will be discussed briefly in the context of this case to

demonstrate that they are also of little or no merit.

(a) Avoidance of Delay:

The Secretary's reference to delays remains somewhat unexplained in his Brief.40/ If it refers to the fact that the 1981 election in this case did not result in installation of new officers for approximately ten months time after they would otherwise have been installed, the argument fails to take accounts of the "test case" character of this case, the unwillingness of the union to admit ultimately uncontested facts, and the unwillingness of its affiliates to supervise a rerun election. Each of these resulted in greater delays than one would ordinarily face in future cases of this kind.

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40. See pages 35-45 therein, where the Secretary asserts, but then fails to discuss this factor at all.

More importantly, though, the Secretary's argument about avoidance of delay is at best disingenuous, since the record of the Secretary's performance in speedily resolving Title IV complaints has in effect rendered the Title IV remedy a Pyrrhic one. Even the ten month delay between the 1980 and 1981 elections encountered herein compares quite favorably with the more than two and one half years average delay encountered in cases the Secretary litigates under Title IV.41/ Given the three year term of office with which this case is concerned, the result here was that previously lawfully elected officials remained as lame ducks for 19% of the term to follow contrasts quite favorably with the cases handled by the

41. "Union Elections," supra, 81 Yale L.J. at 573.

Secretary which have resulted in unlawfully elected officials' staying in office for an average of 85% of the term for which they were unlawfully elected, a 447% longer delay. Had the Petitioners' affilliate, Joint Council 10, agreed to supervise the Court's election, the Court's order of February 12, 1981 could have gone immediately into effect, resulting in a delay of less than four months from the original installation date to the one for the 1981 election. The purpose of avoiding delays is far better served for this and other reasons 42/ by affirming the

42. Referring to Title I pre-election relief, one commentator noted:

> "Lastly, delay of the election need not be undue in such cases. Injunctions against infringements of free speech or orders to have voting at a more convenient time or place will not delay the election at all. Even a finding of inadequate notice would typically necessitate only short delays."
> "Union Elections," 81 Yale L.J. at 562 (emphasis added).

decision below than by adopting the position urged by Petitioners and the Secretary.

(b) Resolution By The Union Itself:

The facts of this case also demonstrate that affirmance of the decisions below will not frustrate the Congressional goal of resolution of such matters by the union itself, to the extent Congress had any such goal with reference to Title I.43/ The discipline of the Respondent Lunnin was in fact so resolved (Pet. App. A at 6), as were the questions of voiding the December, 1980 election and determining that a 1981 election should be

43. It is dubious Congress had such a goal with reference to Title I, wherein it made exhaustion discretionary. Though the decision in Calhoon does not require such a conclusion, Justice Stewart, joined by Justice Harlan, in fear that it might be read that way, noted in their concurring opinion:

held. Indeed, all of the District Court's order concerning the conduct of the electoral processes of the union resulted either from the union's proposing that, when, and how it be done, or from its refusing to remedy its own misdeeds. The opportunity to remedy these wrongs internally was as fully provided in the context of this Title I case as it could or might have been under Title IV.

Nonetheless, the Court finds a "general congressional policy" to avoid judicial resolution of internal union disputes. That policy, the Court says, was designed to limit the power of individuals to block and delay elections by seeking injunctive relief. Such an appraisal might have been accurate before the addition of Title I, but it does not explain the emphasis on prompt judicial remedies there provided. In addition to the injunctive relief authorized by s. 102 and the saving provisions of s. 103, s. 101(a)(4) modifies the traditional requirement of exhausting internal remedies before resort to litigation.
379 U.S. at 145.

Again it should be mentioned that unlike technical violations of Title IV, Title I violations, being in their nature more generally akin to intentionally discriminatory treatment, are inherently less likely to be corrected by the very persons who engaged in the wrong.

(c) Screening Frivolous Complaints and (e) Supervising Remedial Elections:

The Court of Appeals correctly determined that Secretary has less, not more expertise than the Courts in evaluating and screening out complaints of Title I violations because:

> The rights protected by Title I, particularly equal rights to participate in union elections, free speech, and due process, 29 U.S.C. §411 (a)(1),(2),(5) are in the nature of rights traditionally protected by the federal courts. Title I rights are not rights as to which the Secretary has particular expertise... Pet. App. B at 59.

The Secretary has not addressed at all why his expertise 44/ is greater than the Court's as regards screening Title I complaints and instead focuses only on his expertise in supervising elections.45/ Futhermore, the Secretary closes his eyes to the very facts of the case at hand, wherein the District Court below delegated this function to people with substantial expertise in supervising elections, as most any court could and would in all probability do. In fact, there is no

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44. "Second, the Secretary's 'special knowledge and discretion' are not likely to exceed the expertise of the federal bench in first amendment adjudication. Any deference to administrative expertise, moreover, would contravene the legislative determination to assign to the courts the task of adapting first amendment precedents to the special union context."
"Twilight Zone," 74 Col. L. Rev. at 1132 (footnote omitted).

45. "The Secretary... provides only nominal supervision of court-ordered reruns." Id., at 1117.

reason the Courts could not appoint former employees of the Secretary who have become private attorneys or arbitrators, many of whom would have more years of precisely that kind of experience than most of the Secretary's present employees. Furthermore, there is no reason the Courts could not promote union self-regulation by appointing intermediate or higher union bodies to supervise rerun elections as the Court attempted to do in the instant case. Surely, these entities are not lacking in the requisite expertise.

Nor has the Secretary made much of any case for two other propositions he simply assumes are correct: that Title IV processes will be less disruptive to unions than Title I pre-election relief; and that his supervision of union elections is particularly expert or helpful. The

commentators who have objectively addressed themselves to these propositions tend to believe both are of little merit.46/

Simply stated, by these arguments the Secretary urges this Court not to uphold the will of Congress, but to ignore it.47/

46. One commentator notes:

> Although pre-election suits may be unsettling, reruns resulting from post-election suits are even more disruptive. They appear to cause far more emotional strain and loss of time for all candidates. In cases where an election violation is likely to result in a rerun, it is to the union's benefit to have the defect remedied before the election. Secondly, it seems highly unlikely that the availability of pre-election relief will greatly increase the number of suits brought against unions.

"Remedies," 81 Yale L.J. at .

See also comments in "Twilight Zone," 74 Col. L. Rev. at 1137-8 and "Union Elections," 42 U. Chi. L. Rev. at 179-80.

47. There is no doubt that Congress explicity voted that the Secretary not be charged with the duty of enforcing Title I rights. In successfully urging that the Secretary not be charged with this duty, Senator Kuchel cited the "interest of justice" (105 Cong. Rec. 6720 (1959)).

(d) Consolidation of Meritorious Complaints:

Finally, the Secretary ignores the self-evident fact that Title I suits regarding elections do not defy consolidation. Quite to the contrary, they will most often be brought in a consolidated fashion, as the instant one was, and even if not, would be considered to be related cases, assigned to a single

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Senator Kefauver explained his reasons for the same thusly:

> I wish to congratulate the sponsors of the [Kuchel] amendment on the amendment they have presented, leaving out section 103 [of the McClellan amendment], which, as has been stated, would put the Secretary of Labor in the middle of actions of every labor union in the United States and give him the right to institute suits at his will. It would be very difficult to carry on management-labor relations in the public interest if an unthoughtful Secretary of Labor wished to interfere. This section, plus the absence of a requirement for jury trials, were the principal reasons I voted against the McClellan amendment.
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> 105 Cong. Rec. 6726 (1959)

judge, and in most instances, formally consolidated as well.

B. THE PROCEDURES ESTABLISHED UNDER TITLE IV OF THE LMRDA DO NOT BAR A COURT FROM GRANTING PRE-ELECTION RELIEF AFFECTING THE CONDUCT OF AN ELECTION WHEN TITLE I OF THE ACT HAS BEEN VIOLATED

(1) The Legislative History Demonstrates That Title IV Was Not Intended To Preempt Pre-Election Remedies, State or Federal

The assertion of Petitioners and the AFL-CIO that Congress intended Section 403 of the Act to preclude any Title I election remedies for violations that occur after the election process has commenced is tantamount to asserting (a) that Congress intended to give more preferred treatment to then-existing state law remedies than to those in Title I, and (b) that Congress intended that election related violations be in effect not remediable under Title I

of the Act. There is no support for either of these two propositions in the Congressional history of the Act.

As argued extensively in Section IIA(1), supra, the legislative history of Title I demonstrates that its references to electoral rights are not the result of Congressional oversight, but of the conscious design of Congress. So too, the legislative history of Title IV demonstrates that Section 403 was neither directed at Title I nor intended to preclude remedies thereunder as soon as the electoral process has commenced.48/

48. "On this point, Title IV's legislative history is equally unclear, but there is no evidence of a Congressional intent to foreclose generally federal pre-election relief. When one considers the patent limitations upon the effectiveness of Title IV's post-election remedy, the argument that Congress could not - and did not - intend to foreclose all pre-election relief is demonstrably stronger."
"Twilight Zone," 74 Col L. Rev. at 1113-4.

Indeed, to read such an intent into the Act or the aforerelated statements of supporters of the amendments creating Title I requires the same total rewriting of the terms of Title I that the Secretary's "oversight" argument does.49/

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49. The Petitioners' Brief cites a study of New York State cases by Professor Clyde Summers in which they quote him as saying the casting of ballots concludes the election process. Although Summers says this when the ballots are cast in person and hence counted within hours of the casting of the first ballot, Professor Summers goes on to say, "when mail ballots are used and voting extends over weeks or months, injunctions may be sought either to void the voting or to protect the handling of ballots." The thrust of Professor Summers argument which was written before the passage of the LMRDA and thus took into account only Title IV actions and did not consider Title I issues at all, was the preservation of union democracy via free and democratic union election. In this vein Professor Summers says, "the great majority of suits are... brought prior to voting, and the New York Courts have not hesistated to correct the process in mid-course. If members are forcibly prevented from making nominations, or if candidates are wrongfully stricken from the ballots, the election must be a nullity. C. Summers, "Judicial Regulation of Union Elections," 70 Yale L. J. 1243 (1961) at 1245.

Congress explicitly preserved pre-election state law remedies from the preclusive scope of Section 403 of the Act because many of its members did not want only the limited rights provided under the Act available to union members.50/ Title

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The major concerns Summers expresses in regard to judicial intervention are correction of election defects with a minimum of costs (e.g. those of new election) and "more importantly avoidance of internal disruption caused by the lack of legitimatized leadership and the turmoil of another and more bitter campaign."

50. See Calhoon, supra, at 146. To interpret "pre-election" more narrowly places the Court in the dilemma of reaching an interpretation quite at odds with the intent of Congress and the words of the Act itself, as noted by the court in Kupau, supra:

> Language in Dunlop v. Bachowski, 421 U.S. 560, 566, 95 S. Ct. 1851, 1857, 44 L.Ed. 2d 377 (1975), suggests that Title I relates only to pre-election conduct. It is difficult to take such a suggestion literally since Title I relates expressly to voting, which is not pre-election conduct. 622 F.2d at 456

I was unquestionably intended to supplement the rights guaranteed by Title IV and the state and commmon law pre-election remedies left intact under Section 403. Since all parties hereto concede that Congress felt it was safe and proper to preserve those remedies, which included -

> a decree in equity ousting the officers or ordering an election;... to supervise the conduct of an election;... to enjoin an international president from interfering with a local election;... (and) to intervene in union elections...
> Cox, "The Role of Law in Preserving Union Democracy," 72 Harv. L. Rev. 609 (1959) at 625-626

prior to the conduct of an election under Title IV, it is hard to understand why at minimum the same should not be true for Title I remedies, which Congress created for the same reason it preserved pre-election state law remedies.

(2) Policy Considerations Mandate That Title I Remedies Affecting The Conduct Of Elections Be Permitted At Least Until All The Ballots Have Been Counted

Pre-election enforcement of Title I rights is in no way inconsistent with the goals or policies of either Title, as the commentators who have examined the implications of the decision of this Court in Calhoon have concluded.51/ With regard to the question of when an election has been "already conducted" within the meaning of Section 403 of Title IV, 29 U.S.C. 483, the Court of Appeals held in the instant case the election had not already been conducted when the ballots had been sent out, some returned and none counted.52/

51. See "Union Elections," 81 Yale L.J. at 178-9; "Remedies," 42 U. Chi. L. Rev. at 179; and "Twilight Zone," 74 Col. L. Rev. at 1137.

The Court concluded that the legislative history, case law, the common sense meaning of the phrase, and policy considerations all supported such a conclusion (Pet. App. B at 62-67).

Though Petitioners initially argued that there were two Circuit Court decisions conflicting with this conclusion of the First Circuit Court of Appeals, they now contend that there are only two decisions, both district court decisions, concerning mail ballots that even arguably fit such a description. A review of even these two decisions reveals neither one to have relied for its holding on such a

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52. Though the Court of Appeals concludes that in general an election is not "already conducted" until all the ballots are counted (Pet. App. B at 67), this is not a necessary part of its holding.

conclusion.53/ Furthermore, the aforementioned recent decision of the Ninth Circuit in Canez, supra is in accord with the decision of the First Circuit in the instant case.

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53. Despite discussing the question of when a mail ballot election has been "already conducted" under s. 403 of the LMRDA, 29 U.S.C. s. 483, in both of these decisions the courts examined the merits of claims presented and concluded that no Title I claim was presented. Laski v. Intern. Organization of Master, Mates and Pilots, 502 F.Supp. 134, 136-7 (S.D.N.Y. 1980); New Action Coalition v. Local 2, United Federation of Teachers, 510 F.Supp. 1208, 1212-4 (S.D.N.Y. 1981). Hence, neither decision can fairly be said to have relied on its conclusion as to when "an election (is) already conducted."

Furthermore, even if the New Action decision could be so interpreted, that decision, unlike the instant case, concerned a case where the "counting of the ballots... [had] been substantially completed" prior to the Court's consideration of the Plaintiffs' request to enjoin tabulation. 510 F.Supp. 1208, 1210.

The same may have been the case in Laski, supra, where the ballots had been mailed a full month and a day before the Court ruled on Plaintiffs' request to preliminarily enjoin their tabulation. 502 F.Supp. at 134-5.

Additionally, as noted heretofore, the Secretary has done a complete turnabout in his position to this Court on this question. Unlike the stance he took in his brief in support of the Petition for a Writ of Certiorari in this case, the Secretary's current stance is that he believes an election is already conducted "no later than when the tally of the ballots is begun." (Brief for Federal Respondent, 43-44 at n.19). Since the facts of the instant case are that the tally had not begun when relief was granted Respondents by the District Court,54/ the Secretary

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54. The instant appeal does not concern an election in which suit was filed after all the ballots were cast, or in which the Court intervened after all the ballots were cast and collected, much less after they were counted. Indeed the record is silent as to whether all the ballots had even distributed as of said date.

now would appear to be arguing for affirmance of at least this aspect of the holding of the Court of Appeals herein.

As Justice Stewart, joined by Justice Harlan, notes in concurrence in Calhoon, neither language of the LMRDA nor the policies underlying it support the conclusion that Title I rights may not be enforced through suits brought prior to the tally of votes:

> Even [section] 403 is not conclusive in the elimination of pre-election remedies. At the least, state-court actions may be brought in advance of an election to "enforce the constitution and by-laws." And as to federal courts, it is certainly arguable that recourse through the Secretary of Labor is the exclusive remedy only after the election has been held. By reading Title I rights so narrowly, and by construing Title IV to foreclose absolutely pre-election litigation in the federal courts, the Court sharply reduces meaningful protection for many of the rights which Congress was so assiduous to create. By so simplifying the tangled provisions of the Act, the Court renders it virtually impossible for the aggrieved union member to gain a

> hearing when it is most necessary - when there is still an opportunity to make the union's rules comport with the requirements of the Act. 379 U.S. at 145-6.

Petitioners' arguments regarding these policy issues have been briefly discussed in Section IIA of this brief. Herein Respondents will only address a few of opposing parties' arguments not replied to therein. Petitioners maintain that remedies of the kind permitted by the District Court and the Court of Appeals in this case burden the party responsible for unlawful actions with the costs of attorneys fees and rerunning its own election (Brief of Petitioners at 35-36). Yet it was precisely because the alternative would be to burden the public coffers with these administrative and litigation costs that members of the House of Representatives supported the adoption of the Kuchel amendment.55/ In doing so

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55. See note 20 herein.

they flatly rejected the position urged by Petitioners and solidly adopted the one implicitly urged by Respondents and adopted by the Court of Appeals.

Likewise, deference to internal union processes will often not be appropriate when dealing with Title I pre-election claims. As one commentator noted:

> Most allegations of infringement of rights to participate in the electoral process will fulfill the proposed criteria for granting pre-election relief. Internal exhaustion will often be futile, for the charge of abridging participatory rights will be directed at the very officers who would be hearing any internal appeal. Pre-election appeal beyond the local is often unavailable. Courts should in these instances find internal exhaustion unnecessary. The issues involved in suits to enforce participatory rights will often be purely factual and the relevant principles clear.
> "Union Elections," 81 Yale L.J. at 562.

Finally, while there might be some unfairness in permitting a member to wait to see what the results of an election are before deciding whether to seek to have a

violation of Title I corrected thereunder, there is no like unfairness in permitting a candidate to do so before the ballots have been counted.

Hence at a minimum this Court should concede that pre-election relief under Title I is a desirable and necessary remedy to advance the primary objective of both Titles I and IV of the LMRDA: protecting and fostering internal union democracy.

Conclusion

For the reasons set forth in Part I above the instant writ should be dismissed as moot and/or improvidently granted; in the alternative, for the reasons set forth in Part II above the order of the Court of Appeals should be affirmed.

Respectfully submitted,

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